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# Is Modern Liberty Ancient? Roman Remedies and Natural Rights in Hugo Grotius' Early Works on Natural Law

Benjamin Straumann\*

*This paper argues that Hugo Grotius (1583-1645), a major protagonist in the history of individual natural rights, developed his highly influential rights doctrine by reference to ancient Roman legal remedies and Cicero's moral philosophy. The paper thus puts forward a fresh account of the historical background of modern thinking on rights, one that runs counter to the traditional liberal historical account, epitomized by Benjamin Constant, according to which modern liberty is distinct from ancient liberty precisely on account of the alleged lack of a concept of individual rights in classical antiquity. It is argued that Grotius, a humanist steeped in Roman law, had substantive reasons for using his Roman sources. Roman law had already developed a doctrine of the freedom of the high seas, based on the idea of the sea as having remained in a natural state. Furthermore, Roman law and Cicero's ethics provided a fair amount of commerce driven remedies in contract law, which were part of the so-called law of peoples (ius gentium), a body of law initially created to accommodate foreign people, especially merchants, and give them standing in Roman courts. Although this paper's focus is not on the Roman texts themselves, but on the use Grotius made of them in some of his early works, the paper does entail the claim that those texts contain a concept of subjective rights. Moreover, it is suggested that the paper's historical account can contribute not only to a better doctrinal understanding of Grotius rights doctrine, but also to a better understanding of modern liberal doctrines of rights.*

## *Introduction: Modern Liberal Rights v. the Ancient Empire of the Legislator*

Modern liberty rests on individual rights. A classic expression of this view can be found in Benjamin Constant's famous 1819 lecture "*De la liberté des anciens comparée à celle des modernes*", where Constant, drawing on Condorcet, developed a rights-based notion of "modern" liberty by contrasting it with the "liberty of the ancients":

The ancients, as Condorcet says, had no notion of individual rights. Men were, so to speak, merely machines, whose gears and cog-wheels were regulated by the law. The same subjection characterized the golden centuries of the Roman republic; the individual was in some way lost in the nation, the citizen in the city.<sup>1</sup>

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<sup>1</sup> Benjamin Constant, "The Liberty of the Ancients Compared with that of the Moderns," in id., *Political Writings*, ed. B. Fontana (Cambridge, 1988), 312.

Modern liberty, on the other hand, consists on Constant's view in an array of individual rights, such as the right of "everyone to express their opinion," the right to "dispose of property, and even to abuse it," or the right "simply to occupy their days or hours in a way which is most compatible with their inclinations or whims."<sup>2</sup> Constant credits commerce as the crucial force for the development of this rights-based, "modern" conception of liberty, which not only "inspires in men a vivid love of individual independence"<sup>3</sup> and "emancipates" the individual, but also helps to make individuals "stronger than the political powers."<sup>4</sup>

This tenacious view of an "ancient" version of liberty, lacking any notion of subjective rights and lacking therefore what Isaiah Berlin has called "negative" liberty,<sup>5</sup> seems to be informed mainly by an interest in the constitutional structures of the societies of classical antiquity, and, as far as democracy and the democratic elements of Greek antiquity are concerned, nourished by the bias against democracy expressed by most of classical political philosophy. It is a line of thought that can easily be traced back to Hobbes' scornful remarks about the liberty of the "Athenians, and the Romans" in *Leviathan* as well as to the contrast drawn by Rousseau in his *Contrat social* between the modern and the ancient state.<sup>6</sup>

The Spartan constitution, the Roman republic and the Athenian democracy, according to Constant shared to some degree a lack of respect for the independence of individuals, subjecting instead all but every conceivable action of the individual "to the empire of the legislator."<sup>7</sup> The Athenian democracy, it is true, "allowed to its citizens an infinitely greater individual liberty than Sparta or Rome"—yet not by virtue of its being a democracy, but because of all the ancient polities Athens was the one "most closely

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<sup>2</sup> Ibid., 310f.

<sup>3</sup> Ibid., 315.

<sup>4</sup> Ibid., 325. For this tradition of thought, see W. Nippel, "Antike und moderne Freiheit," in W. Jens, B. Seidensticker (eds.), *Ferne und Nähe der Antike* (Berlin, 2003), 49-68. Nippel shows a line of argument ranging from Constant over Fustel de Coulanges, Jacob Burckhardt and Lord Acton to Max Weber, and influencing 20th century historians such as Moses Finley and Paul Veyne.

<sup>5</sup> Isaiah Berlin, "Two Concepts of Liberty," in id., *Four Essays on Liberty* (Oxford, 1969).

<sup>6</sup> Hobbes, *Leviathan*, ed. R. Tuck, rev. student ed. (Cambridge, 1996), ch. 21, 149f.; Rousseau, *The Social Contract and Other Later Political Writings*, ed. V. Gourevitch (Cambridge, 1997), 114f.

<sup>7</sup> Constant, "Liberty of the Ancients," 319.

engaged in trade.”<sup>8</sup> Notwithstanding these differentiations, Constant relied on the basic unity of the classical constitutional world and equated the “liberty of the ancients” with “active and constant participation in collective power,” thereby faulting the ancients as a whole with having mistaken “the authority of the social body for liberty” and with subjecting the citizens entirely “in order for the nation to be sovereign.”<sup>9</sup> Amongst Constant’s coevals, by contrast, “individuals have rights which society must respect.”<sup>10</sup> This provides a constraint on the “empire of the legislator”—laws, although preferable to the arbitrary power of men, must have their limits too.<sup>11</sup>

Constant associated the revival of classical constitutional ideals with the period of the Terror after the French Revolution and with the Jacobins’ revival of Greek and Roman models. With his speech on the *Liberty of the Ancients Compared with that of the Moderns*, he aimed to curb whatever enthusiasm was left in post-Napoleonic times for imitating the republics of antiquity or at least certain “republican usages” such as Athenian ostracism or Roman censorship. The thrust of Constant’s argument exhibits thus very clearly a dichotomy between ancient republicanism and liberalism, a dichotomy that was to feature prominently in the historiography of political thought in general and that can also be profitably demonstrated in the historiography of the American revolutionary and early republican periods.

The historiography of American political thought has drawn on the dichotomy between ancient republicanism and liberalism to a considerable extent, using the two concepts in order to describe the American Founding in terms of a shift in political thought from classical republicanism to modern liberalism. Historians have differed over the question of where to draw the line in the chronology of late colonial and early American political thought, but the integrity of the concepts has never been called into question. While Bernard Bailyn in *The Ideological Origins of the American Revolution* (1967) had insisted on a minor role for classical republicanism in the founders’ political thought, a

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<sup>8</sup> Ibid., 315.

<sup>9</sup> Ibid., 318.

<sup>10</sup> Ibid., 321.

<sup>11</sup> Ibid., 320.

role confined to providing an indirect source mediated by the British Whig tradition,<sup>12</sup> other historians have followed Gordon Wood in conceding far more weight to ancient republicanism in the revolutionary period,<sup>13</sup> at least up to 1787, when a “transformation” took place “from a republican to a liberal [...] culture,”<sup>14</sup> where liberty meant personal or private liberty.<sup>15</sup> A few years later, John Pocock further extended the importance of the classical republican tradition into the early national period.<sup>16</sup> Paul Rahe, an ancient historian by education, in his *Republics, Ancient and Modern* (1992), while acknowledging a “mixture of sorts,” also remained attached to the dichotomy between “ancient republican” and “modern liberal.”<sup>17</sup>

A similar description can be given of the historiography of republican thought in general, showing that the dichotomy between classical republicanism and modern liberalism is at work here too. Indeed, as Stephen Holmes has noted, “the history of modern political theory has recently been reconstructed as a running battle between two supposedly rival traditions: liberalism vs. republicanism.”<sup>18</sup> In Quentin Skinner’s work, the battle has been reframed as a debate about whether the constitutional framework of a society has a bearing upon the individual liberty of its members, with what Skinner calls the “neo-roman theorists” maintaining that it does, and their critics, such as Thomas Hobbes and later Isaiah Berlin, that it does not. In Skinner’s account, the republican camp has thus been broadened and made to include adherents of all sorts of constitutional arrangements short of absolutism, not just republican writers in a stricter sense. These “neo-roman theorists”—among whom Skinner counts Harrington, Machiavelli, Milton, More, Nedham, Neville, Sidney—saw individual liberty as conditioned upon the existence of a

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<sup>12</sup> B. Bailyn, *The Ideological Origins of the American Revolution*, enlarged ed. (Cambridge Mass., 1992), 22-54.

<sup>13</sup> G. Wood, *The Creation of the American Republic, 1776-1787*, 2<sup>nd</sup> ed. (Chapel Hill, 1998), 48-53.

<sup>14</sup> *Ibid.*, xii.

<sup>15</sup> *Ibid.*, 609.

<sup>16</sup> J. G. A. Pocock, *The Machiavellian Moment. Florentine Political Thought and the Atlantic Political Tradition* (Princeton, 1975).

<sup>17</sup> P. Rahe, *Republics, Ancient and Modern. Classical Republicanism and the American Revolution* (Chapel Hill, 1992), x.

<sup>18</sup> S. Holmes, *Passions and Constraint. On the Theory of Liberal Democracy* (Chicago, 1995), 28.

“free state,” drawing upon an analogy between individual freedom as non-slavery and the freedom of states as not being subject to tyrannical rule.<sup>19</sup>

But while it is probably correct to interpret Hobbes’ conception of liberty as a rather narrow one, Skinner’s account is less convincing with regard to his opposition between the so-called neo-roman theorists on the one hand and liberals “after liberalism,” such as Benjamin Constant, on the other. It seems that, although deliberately allowing for a wide range of constitutional make-ups, the writers he calls “neo-roman” are in fact united in terms of a commitment to constitutional safeguards limiting the authority of the government. Skinner does mention this aspect briefly, yet without paying sufficient attention to it; his “neo-roman” theorists, in permitting for “a monarch to be the ruler of a free state,” surely qualify for being proponents of “self-rule” and liberty only through their commitment to safeguards which bereave the “head of state [...] of any power to reduce the body of the commonwealth to a condition of dependence.”<sup>20</sup> But if this is so, what distinctly “neo-roman” properties remain? Or, to put it differently, do not these theorists themselves seem to be subscribing to an ideal of liberty “after liberalism” after all? In stressing safeguards and elevating them to the status of necessary and sufficient conditions of liberty, are these writers not in fact giving up on anything distinctly “neo-roman” in favor of the liberal view, shared by Hobbes and Constant, according to which it is not the “source of law but its extent”<sup>21</sup> that matters? If safeguards are key, regardless of the precise constitutional structure surrounding them, it would seem that the distinction between neo-roman and liberal collapses, opening up once again the gap between liberalism, neo-roman or not, and republicanism of the narrow sort which is concerned with participation and self-rule rather than constraints on the sovereign authority.

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<sup>19</sup> Q. Skinner, *Liberty before Liberalism* (Cambridge, 1998), *passim*. Skinner observes that the “neo-roman writers on the *vivere libero* from the Italian Renaissance,” Machiavelli, for example, never employed the language of rights (18), an observation which leads him to the conclusion that theories of liberty in principle can do without presupposing any kind of subjective individual rights—even theories of negative liberty, since the “neo-roman” concept on Skinner’s view counts as a version of the concept of negative liberty. See also *id.*, “The Idea of Negative Liberty,” in R. Rorty, J. B. Schneewind, Q. Skinner (eds.), *Philosophy in History* (Cambridge, 1984), 203.

<sup>20</sup> *Ibid.*, 54f.

<sup>21</sup> *Ibid.*, 85. See Hobbes, *Leviathan*, ch. 21, 149.

Thus wherever historians were inclined to draw the distinction, and whatever the differences between the various scholarly approaches described, a belief in the basic dichotomy between ancient republicanism and modern liberalism is common to all of them. The belief seems to rest on two, usually implicit assumptions: first, the assumption that there is such a thing as “ancient republicanism,” i.e. that the various versions of classical republicanism and instances of actual republics as evidenced by classical literature, philosophy and historiography can be said to share a sufficient number of properties to make the unifying concept meaningful; and second, the assumption that the concept of liberty as based on individual rights and on constraints on public powers is a distinctly modern idea, liberty after liberalism as it were, paying less attention to self-government but stressing the limits of the “empire of the legislator.”

This rough historical picture and the attending dichotomy prove to be too rough-and-ready in terms of historical accuracy and stand in need of differentiation. The reason why the picture has developed in the first place lies, I argue, in too selective a focus in terms of the traditions that came to serve as resources for early modern proto-liberal thought. A certain re-orientation, increasingly skeptical of the unifying concept “ancient republicanism” and more sensitive to differentiation, is already visible in the historiography of political thought. Earlier research that had assumed “classical republicanism” *tout court*<sup>22</sup> has given way to studies focusing on the substantial differences between Greek and Roman political thought and institutional legal history.<sup>23</sup> In what follows, I will complicate things a bit further on the Roman side. Broadly speaking, there are two traditions that deserve our attention: The first is looking at the early Roman republic and its institutions, as it appears in the historical writings of Livy and Dionysius of Halicarnassus, in the biographies of Plutarch, and in Polybius’ constitutional analysis. This is what has been called the republican tradition and what can be found in Machiavelli and then again in 17th century English and 18th century French and American political thought, and it was this tradition which provided the

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<sup>22</sup> See, e.g., J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, 1975).

<sup>23</sup> The most recent example is E. Nelson, *The Greek Tradition in Republican Thought* (Cambridge, 2004).

foundation for Hobbes', Rousseau's, and Benjamin Constant's claims about the nature of ancient liberty.<sup>24</sup>

But there is a second tradition that has proved at least as influential, looking not to the mythical Roman republic of Livy's first ten books (covering the years 509 to 292 B.C.), but to texts stemming from the last century of the Roman republic and later. More importantly, the texts used in this second tradition are not so much historical narratives, nor are they especially concerned with analyses of various constitutional or institutional arrangements. Rather, they are of a *normative* nature, namely some of Cicero's ethical works and, most importantly, texts from the body of private Roman law contained in Justinian's *Digest*. Furthermore, the exponents of what I have called the second tradition were not concerned with political theory strictly speaking; instead they were putting forth ethical theories about the normative conditions obtaining in a state of nature, that is to say theories of natural law. In developing these theories, the exponents of the natural law tradition referred back to resources providing a rights-based account of rules obtaining both within and without the Roman polity. The state of nature, as conceived by Grotius and his followers, became a domain governed by remedies contained in the Roman praetor's edict and later integrated in Justinian's *Digest*; these remedies, however, were stripped of their original jurisdictional meaning and turned into substantive rights.<sup>25</sup>

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<sup>24</sup> Constant's view is probably untenable with regard to "the ancients" as a whole even if one were willing to grant the narrow, restricted focus on institutional history. The view seems tailored to the Greek concept of freedom, and would most probably not withstand scrutiny in terms of Roman institutional history; the Romans considered their constitutional safeguards, such as the right to appeal a magistrate's order (*provocatio*), as "bulwarks to guard freedom." Liv. 3, 45, 8; see also Cic. *rep.* 2, 55. In the Greek city-states, "the concept of freedom gained political importance [in the context] of the community's defense against foreign rule and tyranny," and was thus understood collectively. In Rome, by contrast, *libertas* had a "primarily negative orientation," and was "almost without exception—for aristocrats and commoners alike—protection against (excessive) power, force, ambition, and arbitrariness." In Rome, the freedom concept was focused "on the needs of individual citizens," and "its function was markedly negative and defensive," and was "linked primarily with individual rights that eventually were fixed by law." It is of course this last aspect that provides the link to the tradition which is the subject of this paper. K. Raaflaub, *The Discovery of Freedom in Ancient Greece* (Chicago, 2004), 267; see also C. Wirszubski, *Libertas as a Political Idea at Rome during the Late Republic and Early Principate* (Cambridge, 1950).

<sup>25</sup> Reminiscent of the way Edward Coke's *First Institute* was used in the American colonies before the Revolution and in the early Republic: "From the late seventeenth century until the early nineteenth, Americans learned property law from Coke's treatise without regard to the court system in which those rules arose, which magnified the conceptual division between remedy and right, jurisdiction and jurisprudence, the Westminster courts and the common law." D. Hulsebosch, "The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence," *Law and History Review* 21 (2003): 439-482, at 480.

It is the use of these normative Roman works by the natural law tradition that I wish to tackle in this paper, or rather the use of those works by one pivotal exponent of that tradition, namely Hugo Grotius. Grotius is exceptionally well qualified for this role because not only was he the first of the natural lawyers to develop a fully-fledged account of subjective natural rights,<sup>26</sup> but he also proved to be highly influential in subsequent moral, political, and legal thought.<sup>27</sup> The natural law tradition he shaped was later to endow political theorists of the republican mold with a moral account of a realm outside of or previous to the political, viz. the state of nature, thus providing political theory with a yardstick that made a moral evaluation of the extent of political power—the “empire of the legislator”—possible in the first place. Historically, this combination of the natural law tradition, growing out of the reception of the normative Roman texts mentioned above, with the republican “institutional” tradition led to constitutionalism and the entrenchment of some of the Roman remedies as constitutional rights.

Hugo Grotius’ (1583-1645) doctrine of subjective natural rights is thus well suited for our purposes and will serve to rectify the standard historical view on which the dichotomy between classical republicanism and modern liberalism is based. The Dutch humanist made a crucial contribution to the development of a modern, rights-based natural law advocating the freedom of trade,<sup>28</sup> clearly driven by a desire to promote what

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<sup>26</sup> See P. Haggemacher, “Grotius and Gentili: A Reassessment of Thomas E. Holland’s Inaugural Lecture,” in H. Bull, B. Kingsbury, A. Roberts (eds.), *Hugo Grotius and International Relations* (Oxford, 1990), 133-176, at 161.

<sup>27</sup> See K. Haakonssen, “Hugo Grotius and the History of Political Thought,” *Political Theory* 13 (1985): 239-265; id., *Natural Law and Moral Philosophy. From Grotius to the Scottish Enlightenment* (Cambridge, 1996), 30; id., “The Moral Conservatism of Natural Rights,” in I. Hunter et al. (eds.), *Natural Law and Civil Sovereignty: Moral Right and State Authority in Early Modern Political Thought* (New York, 2002), 27f., sketching a tradition ranging from Grotius to Barbeyrac and Burlamaqui up to the Founding Fathers; for a bibliography containing all editions of Grotius’ works up to 1950, see J. Ter Meulen, P. J. J. Diermanse, *Bibliographie des écrits imprimés de Hugo Grotius* (Den Haag, 1950). For Grotius’ influence on the political thought of the English Whigs, see M. Zuckert, *Natural Rights and the New Republicanism* (Princeton, 1994), 106-115, 188 (on the influence on John Locke’s *Questions Concerning the Law of Nations*). For Grotius’ status as the second most important legal authority after Coke in pre-revolutionary America, see A. E. D. Howard, *The Road from Runnymede: Magna Carta and Constitutionalism in America* (Charlottesville, 1968), 118f. For Grotius’ impact on international law, see P. Haggemacher, “On Assessing the Grotian Heritage,” in *International Law and the Grotian Heritage* (Den Haag, 1985), 150-160. For the influence on the early German enlightenment, see T. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge, 2000).

<sup>28</sup> Grotius’ contribution to the development of a doctrine of natural rights is well known and has received a lot of scholarly attention; see P. Haggemacher, “Droits subjectifs et système juridique chez Grotius,” in L. Foisneau (ed.), *Politique, droit et théologie chez Bodin, Grotius et Hobbes* (Paris, 1997), 73-130, esp. 114, n. 1; B. Tierney, *The Idea of Natural Rights* (Cambridge, 1997), 316-342; R. Tuck, *Natural Rights*

Constant thought to be the force behind “modern liberty,” namely commerce. Yet Grotius developed his conception of natural rights out of materials stemming from a time that had allegedly “no notion of individual rights” and when “[m]en were, so to speak, merely machines, whose gears and cog-wheels were regulated by the law.”

Grotius made use of Roman law and Roman ethics in order to submit a normative case, on behalf of the Dutch East India Company, for a rights-based just war in the East Indies, and his conception of a law of nature was conceived in order to apply a theory of compensatory justice to the high seas of Southeast Asia, envisaged as a natural state lacking political authority.<sup>29</sup> Yet while both Grotius’ immediate political context—his “experience of international relations”<sup>30</sup>—and the medieval just war tradition<sup>31</sup> certainly deserve ample scholarly attention and constitute important influences on Grotius’ natural law tenets,<sup>32</sup> it is a Roman tradition of individual legal remedies which lays claim to a foundational role with regard to Grotius’ conception of subjective natural rights.

There are, apart from the fact that Grotius as a humanist lawyer was steeped in Roman law, also two more substantive reasons for this: Roman law had already developed a doctrine of the freedom of the high seas, based on the idea of the sea as having remained in a natural state; the second reason is that Roman law provided a fair amount of commerce driven remedies in contract law, which were part of the so-called law of

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*Theories: Their Origin and Development* (Cambridge, 1979), 58-81; id., *Philosophy and Government, 1572-1651* (Cambridge, 1993), 137-176; id., *The Rights of War and Peace* (Oxford, 1999), 78-108; J. Tully, *A Discourse on Property. John Locke and his Adversaries* (Cambridge, 1980), 68ff., 80ff., 90, 114, 168; M. Villey, “Les origines de la notion de droit subjectif,” in id., *Leçons d’histoire de la philosophie du droit*, 2<sup>nd</sup> ed. (Paris, 1962), 221-250.

<sup>29</sup> Which is why only a small part of Aristotle’s theory of justice, namely compensatory justice, is imposed on a *polis*-less natural state that is far more susceptible to the normative sources of Roman origin, which place little emphasis on distribution. For a more general account of Grotius’ dependency on a Roman tradition in developing his conception of a state of nature, with special attention to his use of classical rhetoric and his interpretation of the Roman just war tradition, see B. Straumann, “‘Ancient Caesarian Lawyers’ in a State of Nature: Roman Tradition and Natural Rights in Hugo Grotius’ *De iure praedae*,” *Political Theory* 34, 3 (2006): 328-350.

<sup>30</sup> C. G. Roelofsen, “Some Remarks on the ‘Sources’ of the Grotian System of International Law,” *Netherlands International Law Review* 30 (1983): 73-79, at 79.

<sup>31</sup> See the authoritative work by P. Haggemacher, *Grotius et la doctrine de la guerre juste* (Paris, 1983).

<sup>32</sup> For the political context see P. Borschberg, “Hugo Grotius, East India Trade and the King of Johor,” *Journal of Southeast Asian Studies* 30 (1999): 225-248; id., “The Seizure of the Sta. Catarina Revisited: The Portuguese Empire in Asia, VOC Politics and the Origins of the Dutch-Johor Alliance (1602-ca. 1616),” *Journal of Southeast Asian Studies* 33 (2002): 31-62; M. van Ittersum, *Profit and Principle: Hugo Grotius, Natural Rights Theories and the Rise of Dutch Power in the East Indies, 1595-1615* (Leiden, 2006).

peoples (*ius gentium*), a body of law initially created to accommodate foreign people (*peregrini*), especially merchants, and give them standing in Roman courts. This body of rules—albeit clearly positive Roman law founded upon the praetor’s edict—was thought to obtain even beyond Roman jurisdiction and contained remedies granted by the praetor as a matter of equity because they were taken to be furthering some rightful claims.<sup>33</sup> It is not the case, then, that Constant was wrong in identifying a causal relationship between commerce and the development of individual rights—the remedies contained in the *ius gentium*, which in turn had a distinct impact on Cicero’s ethics, were indeed largely commerce driven.

If Constant was right and the concept of individual rights is indeed the defining criterion for the idea of “modern liberty,” the Roman lawyers and Cicero have to be seen as satisfying that criterion. Although this paper’s focus is not on the Roman texts themselves, but on the use Grotius made of them in some of his early works, the paper does entail some claims about those Roman texts, namely that they contain a concept of subjective rights. While it is true that the Romans did not use one term, such as *ius*, to express the concept of rights, this is hardly evidence for their lacking the concept.<sup>34</sup> Indeed, an exaggerated fascination with the term “*ius*” (“right”) has held scholarship hostage for some time, exerting a stifling influence.<sup>35</sup> Almost without exception,<sup>36</sup>

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<sup>33</sup> The legal foundation of these remedies, however, was deemed to consist, in a positivist manner, entirely in the authority (*iurisdictio*) of the praetor. For the *ius gentium*, see the authoritative work by M. Kaser, *Ius gentium* (Cologne, 1993). See also Cicero’s account of equitable remedies in the praetor’s edict, *Cic. off.* 1, 32.

<sup>34</sup> Michel Villey has vehemently argued against a subjective Roman notion of right (an argument that has influenced Isaiah Berlin’s “Two Concepts of Liberty”) and has attributed an important role to Grotius in the development of such a subjective notion; see Villey, “Les origines.” But see, for a Greek origin of rights, F. D. Miller, *Nature, Justice, and Rights in Aristotle’s Politics* (Oxford, 1995); P. Mitsis, “The Stoic Origin of Natural Rights,” in K. Ierodiakonou (ed.), *Topics in Stoic Philosophy* (Oxford, 1999), 153-177. The question of whether the Greek Stoics possessed a concept of rights remains open and need not concern us here. For an overview, see J. Miller, “Stoics, Grotius and Spinoza on Moral Deliberation,” in id., B. Inwood (eds.), *Hellenistic and Early Modern Philosophy* (Cambridge, 2003), 117-120. See also T. Kammasch, S. Schwarz, “Menschenrechte,” in M. Landfester (ed.), *Der Neue Pauly. Enzyklopädie der Antike*, vol. 15, 1 (Stuttgart, 2001), 383-391, who deny an ancient origin of subjective natural rights. Arguing convincingly for a subjective use even of the term *ius* in Roman law is C. Donahue, “Ius in the Subjective Sense,” in D. Maffei (ed.), *A Ennio Cortese*, vol. 1 (Rome, 2001), 506-535; see also M. Kaser, “Zum ‘Ius’-Begriff der Römer,” in *Essays in Honor of Ben Beinart*, vol. 2 (=Acta Juridica 1977), 63-81.

<sup>35</sup> But see G. Pugliese, “‘Res corporales,’ ‘res incorporales’ e il problema del diritto soggettivo,” in *Studi in onore di Vincenzo Arangio-Ruiz* 3 (Naples, 1954), 223-260, who argued early on for a Roman concept of subjective rights; in a similar vein, A. Gewirth, *Reason and Morality* (Chicago, 1978), 100.

Grotius used his sources sensibly and sensitively and developed his own work with very close reference to the Roman texts, which justifies the claim that the various terms used in these sources to describe claims and legal remedies were correctly rendered as “rights” by Grotius.

Of the four natural rights that may give rise to a just cause of war—the right to self-defense, to property, to collect debt, and to punish—the right to private property and the right to collect debt are given most attention in this paper,<sup>37</sup> because these two rights are most intricately tied to what has been acknowledged by liberals such as Constant as a driving force behind the modern concept of rights, that is to say commerce and free trade.<sup>38</sup> The right to punish on the other hand lies beyond the scope of this paper. Suffice it to say that Grotius’ right to punish is a secondary right of sorts, derivative of the primary rights of self-defense, property and collection of debt, and designed to prevent these rights from being invaded.<sup>39</sup>

The paper will proceed in four sections. The first section gives an account of how Grotius, in his early natural law works, developed a conception of subjective natural rights by reference to Roman law remedies. The second provides a brief discussion of Grotius’ right to self-defense and its Ciceronian foundation. Sections three and four deal with the right to private property and the right to enforce contractual claims.

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<sup>36</sup> Significantly, the most important example of gross misinterpretation is Grotius’ deliberate false attribution of a subjective use of *ius gentium* (as “right of nations” instead of “law of nations”) to the Roman jurists; see below.

<sup>37</sup> For Grotius’ right to property, see R. Brandt, *Eigentumstheorien von Grotius bis Kant* (Stuttgart, 1974); S. Buckle, *Natural Law and the Theory of Property. Grotius to Hume* (Oxford, 1991). For contractual rights, see M. Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen* (Köln, 1959).

<sup>38</sup> See Constant, “Liberty of the Ancients,” 325: “The effects of commerce extend even further: not only does it emancipate individuals, but [...] it places authority itself in a position of dependence.”

<sup>39</sup> For Grotius’ as interesting as influential doctrine of a natural right to punish, see B. Straumann, “The Right to Punish as a Just Cause of War in Hugo Grotius’ Natural Law,” *Studies in the History of Ethics* 2 (2006): 1-20, available at <http://www.historyofethics.org/022006/022006Straumann.html>.

## 1. Roman Remedies as Natural Rights

The concept of a state of nature constitutes the foundation of Hugo Grotius' law of nature as well as of his law of nations, both resting on a doctrine of the just causes of war.<sup>40</sup> The legitimate *causae belli* consist on Grotius' account in a violation of rights inhering naturally in every inhabitant of the natural state,<sup>41</sup> rights which in turn correspond to the natural rights pertaining to the individual in the state of nature according to natural law, and to a certain degree even to individuals in lawfully constituted commonwealths. Grotius' early treatise *De iure praedae commentarius* (1604-1606)<sup>42</sup> and its offshoot *Mare liberum*<sup>43</sup> already contained an inchoate version of such subjective natural rights, and a still more elaborate natural rights doctrine can be found in Grotius' early *Theses LVI*<sup>44</sup> and in the *Defensio capitis quinti maris liberi*,<sup>45</sup> a defense of the fifth chapter of

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<sup>40</sup> Grotius tries to render the cause of war as an Aristotelian *causa materialis*. This terminology, however, does not carry any substantive weight and in *De iure belli ac pacis* is abandoned entirely; for Grotius' use of the Aristotelian doctrine of causes in *De iure praedae*, see P. Haggenmacher, *Grotius et la doctrine*, 63ff.

<sup>41</sup> Grotius' doctrine of the just war is also reflected in the early *Commentarius in theses XI*, where only public wars are being discussed, however, and where Grotius does not posit a natural right to punish; see P. Borschberg, *Hugo Grotius "Commentarius in Theses XI". An Early Treatise on Sovereignty, the Just War, and the Legitimacy of the Dutch Revolt* (Bern, 1994), 237ff., 263.

<sup>42</sup> The following edition has been used: Hugo Grotius, *De iure praedae commentarius. A Collotype Reproduction of the Original Manuscript of 1604*, ed. J. B. Scott, *The Classics of International Law* 22, vol. 2 (Oxford, 1950); when *De iure praedae* (henceforth abbreviated as *IPC*) is cited in English, this translation will be used: Hugo Grotius, *De iure praedae commentarius. Commentary on the Law of Prize and Booty*, trans. G. L. Williams, with W. H. Zeydel, ed. J. B. Scott, *The Classics of International Law* 22, vol. 1 (Oxford, 1950). Some of the translations have on occasion been modified.

<sup>43</sup> The twelfth chapter of *IPC*, published anonymously in 1609; the following edition has been used, containing both the text and a translation: Hugo Grotius, *Mare liberum, The Freedom of the Seas*, trans. R. van Deman Magoffin, ed. J. B. Scott (New York, 1916), henceforth abbreviated as *ML*. In the following, when *IPC* or *ML* are cited in English, the translation of *IPC* will be used; the translation in *ML* will be used for passages not contained in *IPC*. Some of the translations have on occasion been modified. For a historical interpretation of *ML*, see P. Borschberg, "Hugo Grotius' Theory of Trans-Oceanic Trade Regulation: Revisiting *Mare Liberum* (1609)," *IILJ Working Paper* 2005/14, *History and Theory of International Law Series* ([www.iilj.org](http://www.iilj.org)).

<sup>44</sup> The manuscript is at Leiden University Library: *Theses sive quaestiones LVI*, BPL 922 I, fols. 287-292 (henceforth abbreviated as *TQ*). Citations refer to folio and thesis number, translations are my own. I would like to thank Professor Peter Borschberg for discussing the *TQ* with me and for generously sharing various drafts of his paper "Grotius, the Social Contract and Political Resistance: A Study of the Unpublished *Theses LVI*," *IILJ Working Paper* 2006/7, *History and Theory of International Law Series* ([www.iilj.org](http://www.iilj.org)).

<sup>45</sup> Hugo Grotius, "Defensio capitis quinti Maris Liberi oppugnati a Guilielmo Welwodo," in S. Muller, *Mare Clausum: Bijdrage tot de Geschiedenis der Rivaliteit van Engeland en Nederland in de Zeventiende Eeuw* (Amsterdam, 1872), 331-361 (henceforth abbreviated as *DCQ*). Translations from *DCQ* are taken from Hugo Grotius, *The Free Sea, translated by Richard Hakluyt with William Welwod's critique and Grotius's reply*, ed. D. Armitage (Indianapolis, 2004), 77-130.

*Mare liberum*, written around 1615 and directed against the Scottish jurist William Welwod's attack on *Mare liberum*.

Grotius developed his conception of subjective rights against the backdrop of the system of Roman private law remedies. In a passage aimed to show that the justification of war, private or public, hinges on the justness of the war's cause, Grotius compares the possible material causes of war with the legal remedies provided by the Roman law of the *Digest*. Having enumerated the four genera of just causes of war, Grotius goes on to simply identify them with the different kinds of Roman legal actions:

[I]n both kinds of warfare, [public and private,] one must consider the causes involved. Of these there are four kinds, as we have pointed out: for the authorities who hold that there are three just causes of war (defence, recovery, and punishment, according to their classification), fail to mention the not uncommon cause that arises whenever obligations are not duly discharged. Indeed, *in so far as we are concerned with subject-matter, which is the same in warfare and in judicial trials, we may say that there should be precisely as many kinds of execution [exsecutiones] as there are kinds of legal action [actiones]* [emphasis added]. To be sure, legal judgements are rarely rendered in consequence of causes of the first class, since the necessity for defending oneself does not admit of such delay; but interdicts against attack [*interdicta de non offendendo*] properly fall under this head. The actions relating to property [*actiones in rem*] which we call recovery claims [*vindicationes*], arise from the second kind of cause, as do also injunctions obtained in behalf of possession [*interdicta possessionis gratia*]. The third and fourth classes give rise to personal actions, namely, claims to restitution [*condictiones*], founded upon contract [*ex contractu*] or upon injury [*ex maleficio*].<sup>46</sup>

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<sup>46</sup> *IPC* 7, foll. 30a<sup>r</sup>f.: *Spectandae igitur in utroque causae, quas esse quatuor diximus. Nam qui tres statuunt iustas bellorum causas, defensionem, recuperationem et punitionem, ut loquuntur, illam non infrequenter omittunt, quae locum habet, quoties quae convenerint non praestantur. Totidem enim esse debent exsecutionum, quot sunt actionum genera, quod ad materiam attinet, quae in bello et iudiciis eadem est. Et ex primo quidem genere raro iudicia redduntur, quia moram istam se tuendi necessitas non permittit. Attamen interdicta de non offendendo huc pertinent. Secundo ex genere sunt in rem actiones, quas vindicationes dicimus: interdicta etiam possessionis gratia comparata. Ex tertio et quarto actiones personales, condictiones scilicet ex contractu et ex maleficio.* Punishment constitutes a cause of war, because guilt (*culpa*) itself creates an obligation; see *IPC* 12, fol. 119. This doctrine of punishment as a natural cause of war gave rise to Grotius' famous theory, anticipating Locke's "very strange doctrine," that the private individual in the state of nature has a right to punish; *IPC* 8, foll. 40f. See B. Straumann, "Right to Punish"; R. Tuck, *Rights of War*, 82.

Grotius maintained that the prohibition of navigation and trade imposed by the Portuguese constitutes an injury according to Roman law.<sup>47</sup> If the matter in question between the Portuguese and the Dutch were taken into court, there could be, according to Grotius, “no doubt what opinion ought to be anticipated from a just judge.” But if such a judgment cannot be obtained, “it should with justice be demanded in a war.”<sup>48</sup> The crucial point to be considered was that, as Pomponius in the *Digest* had decided, “the man who seized [*usurpere*] a thing common to all [*res communis*] to the prejudice of every one else must be forcibly prevented [*manu prohibendus*] from so doing.”<sup>49</sup> The sea according to Roman law was, along with air and flowing water, precisely such a thing common to all.<sup>50</sup>

That follows also from an interdict granted by Labeo, cited by Grotius, which is designed to prevent anything from being done in the sea by which shipping could be obstructed.<sup>51</sup> Most importantly, the violation in question does not have to concern just corporeal things, such as an attack on property—rights can be violated as well.

The defence [*rerum defensio*] or recovery of possessions [*rerum recuperatio*], and the exaction of a debt [*debitum*] or of penalties due, all constitute just causes of war [*iustae bellorum causae*]. Under the head of ‘possessions’ [*res*], even rights [*iura*] should be included.<sup>52</sup>

The use of common goods (*res communes*) such as the high seas is exactly such a right that can be defended in a just war. Grotius, true to his Roman law sources, treats the

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<sup>47</sup> *IPC* 12, fol. 119 (= *ML* 13, p. 74), adducing Ulp. *Dig.* 43, 8, 2, 9; 47, 10, 13, 7.

<sup>48</sup> *ML* 13, p. 75: *Quod autem in iudicio obtineretur, id ubi iudicium haberi non potest, iusto bello vindicatur.*

<sup>49</sup> *ML* 13, p. 75: *Et quod proprius est nostro argumento, Pomponius eum qui rem omnibus communem cum incommodo ceterorum usurpet, MANU PROHIBENDUM respondit.* The adduced passage (Pomp. *Dig.* 41, 1, 50) reads: *Quamvis quod in litore publico vel in mari exstruxerimus, nostrum fiat, tamen decretum praetoris adhibendum est, ut id facere liceat: immo etiam manu prohibendus est, si cum incommodo ceterorum id faciat: nam civilem eum actionem de faciendo nullam habere non dubito.* The conclusion by J. Ziskind, “International Law and Ancient Sources: Grotius and Selden,” *The Review of Politics* 35 (1973), 545 that the use of force was not mentioned by Pomponius, is baffling.

<sup>50</sup> Marc. *Dig.* 1, 8, 2, 1: *Et quidem naturali iure omnium communia sunt illa: aer, aqua profluens, et mare, et per hoc litora maris.*

<sup>51</sup> *IPC* 12, fol. 119 (= *ML* 13, p. 74); the citation is from Ulp. *Dig.* 43, 12, 1, 17.

<sup>52</sup> *IPC* 12, fol. 116’ (a passage omitted from *ML*).

right to use the sea as a quasi-possession under Roman law,<sup>53</sup> in that he treats it as an interest that is, although strictly speaking not capable of being possessed—since *usus* in Roman law is as an incorporeal interest not capable of *possessio*, just of *quasi possessio*<sup>54</sup>—still enjoying the protection of the remedy designed to protect possession. According to Grotius, the right to the use of the high seas can be enforced by means of a prohibitory interdict, which usually prohibits the use of force against the last rightful possessor. In *De iure praedae*, however, this turns into a *right* of the last rightful possessor, i.e. the Dutch, to assert their claim to the use of the high seas by force, given the absence of courts: “For in all cases to which prohibitory interdicts are properly applicable in court procedure, armed prohibition is proper outside the courts.”<sup>55</sup>

The above illustrates a most important way in which Grotius used private Roman law, viz. how he couched the procedural remedies provided by that law in a language of subjective natural rights. In the *Defensio* of chapter five of *Mare liberum*, Grotius elucidates his notion of right in a subjective sense, a notion already applied in the subtitle of *Mare liberum*: “The Right [*ius*] Which Belongs to the Dutch to Take Part in the East Indies Trade.”<sup>56</sup> Grotius, who in *De iure praedae* had used the term “right” (*ius*) in an equivocal way to denote both objective law and subjective rights, ten years later explicitly introduced the notion of a subjective right in his defense of the fifth chapter of *Mare liberum*, directed against William Welwod’s attack.<sup>57</sup> In the *Defensio*, Grotius moved to impute to the Roman lawyers the notion of exactly such a claim-right:<sup>58</sup>

Now add the fact that the sea is not only said by the jurists to be common by the law of nations, but without any addition it is said to be of the right [*ius*] of nations. In these passages “right” [*ius*] can not mean a norm of justice [*norma aliqua iusti*], but a moral faculty over a thing [*facultas moralis in re*], as when we say “this thing is of

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<sup>53</sup> *IPC* 12, fol. 116’ (omitted from *ML*): *Si quis igitur ius tale quasi possideat [...]*.

<sup>54</sup> The terminology is probably post-classical; see W. W. Buckland, *A Text-Book of Roman Law*, 2<sup>nd</sup> ed. (Cambridge, 1932), 196f.

<sup>55</sup> *IPC* 12, fol. 116’ (omitted from *ML*): *Nam quoties in iudiciis interdicta competunt prohibitoria, toties extra iudicia prohibitio competit armata.*

<sup>56</sup> *Mare liberum, sive de iure quod Batavis competit ad Indicana commercia.*

<sup>57</sup> For an excellent discussion of the gradual development of the notion of subjective rights in Grotius’ work, see P. Haggemacher, “Droits subjectifs.”

<sup>58</sup> For the notion of a claim-right, see W. Hohfeld, *Fundamental Legal Conceptions, as Applied in Judicial Reasoning, and Other Legal Essays*, ed. W. W. Cook (New Haven, 1919), 36.

my right [*ius*], that is, I have ownership [*dominium*] over it or use or something similar.”<sup>59</sup>

In *De iure praedae*, Grotius had still used the term iridescently both in its subjective and its objective sense, but here in the *Defensio*, Grotius unambiguously attributed a subjective sense to the notion of right, asserting that *iuris gentium esse* had in fact assumed a subjective sense already in the *Digest*,<sup>60</sup> and suggesting that the genitive *iuris gentium esse* is using the term *ius* in a subjective sense, as in *iuris mei esse*, in order to be able to present the sea as a subjective “right of nations.” Such a subjective interpretation of the formulation *mare iuris gentium esse*, as it appears in the *Digest*, is certainly untenable—the only thing the Roman jurists meant by that phrase was that the sea was governed by the rules of the *ius gentium*. It is not even sure that Grotius himself, when composing *De iure praedae*, understood the phrase *mare iuris gentium* in a subjective sense.<sup>61</sup> Not later than with the *Defensio*, however, this version was convenient for Grotius both because it supported his subjective use of *ius* in other passages and because it sat comfortably with his rendering of the various *actiones* and *interdicta* as rights.

This is one of the very few examples where Grotius, seemingly deliberately, abuses his Roman source material and falsely attributes to the Roman jurists a subjective use of *ius gentium* as “right of nations” instead of “law of nations.” The general thrust of the argument, however, namely that the term “right” (*ius*) could be used consistently to cover the technical Roman law terms for the various remedies, expresses an important insight into the nature of these remedies—especially given the equitable character of those

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<sup>59</sup> Grotius, *Free Sea*, 107; *DCQ.*, 348: *Adde iam quod Mare non tantum dicitur a Iurisconsultis esse commune gentium iure, sed sine ulla adiectione dicitur esse Iuris gentium, quibus in locis ius non potest significare normam aliquam iusti, sed facultatem moralem in re: ut cum dicimus haec res est iuris mei id est habeo in ea dominium aut usum aut simile aliquid.* The notion of *ius* as a *facultas* had already been developed by Jean Gerson in the early 15th century; see R. Tuck, *Natural Rights*, 25f; but see B. Tierney, “Tuck on Rights. Some Medieval Problems,” *History of Political Thought* 6 (1983), 429-441; id., *The Idea of Natural Rights* (Atlanta, 1997), 207-235.

<sup>60</sup> Grotius probably alludes to *Dig.* 1, 8, 4, where it is said that nobody could be denied access to the seashore, provided he keeps clear of houses and buildings, because these are not, as opposed to the sea, subject to the *ius gentium* (*quia non sunt iuris gentium sicut et mare*). Cf. *Inst.* 2, 1, 1.

<sup>61</sup> Grotius refers in *DCQ* back to the following passage in *IPC* 12, fol. 100’ (=ML 5, p. 22): *De mari autem prima sit consideratio, quod cum passim in iure aut nullius, aut commune, aut publicum iuris gentium dicatur.* In the manuscript, the words *iuris gentium* look as if they had originally read *iure gentium*, “according to the law of nations,” and were changed only later to the genitive.

stemming from *ius gentium*<sup>62</sup>—which is in any case rather obvious. As Alan Gewirth<sup>63</sup> and more recently Charles Donahue have pointed out: “A legal system like the Roman that conceives of rights and duties in terms of what one can bring an action for, must have the concept of subjective right, even if it never uses the term.”<sup>64</sup> The rendering of the various remedies, the *actiones* and *interdicta*, as *iura*, and especially the view that doing a wrong consists in a breach of a subjective right, might have been inspired by the French predecessors of Grotius, the humanists of the *mos Gallicus*, particularly by Donellus,<sup>65</sup> but it could already be found in the texts of Roman law codified by Justinian themselves.<sup>66</sup>

In the early, hitherto unpublished manuscript *Theses LVI*, a very important source for the development of Grotius’ thought on rights in a state of nature, Grotius already used the term *ius* in an obviously subjective and individuated sense.<sup>67</sup> In the second thesis, Grotius gives the following description of the rights that belong naturally to man:

A human being naturally [*naturaliter*] has a right [*ius*] to his actions [*actiones*] and his possessions [*res*], a right both to retain them and to alienate them: regarding life and body, only to retain them. This right, flowing from the law of God [*ius Dei*], is

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<sup>62</sup> Where the praetor would grant a remedy based on equity (*aequitas*), even when there was no remedy available in his edict.

<sup>63</sup> See Gewirth, *Reason*, 100.

<sup>64</sup> Donahue, “Ius,” 530. Most Roman law textbooks cannot do without the notion of right; see, e.g., Buckland, *Roman Law*, *passim*.

<sup>65</sup> For Donellus and his subjective conception of *ius*, see H. Coing, “Zur Geschichte des Begriffs subjektives Recht,” in id., *Gesammelte Aufsätze*, vol. 1 (Frankfurt a. M., 1982), 251-254; P. Haggemacher, *Grotius et la doctrine*, 178-180; id., “Droits subjectifs,” 113.

<sup>66</sup> See, e.g., the way Celsus characterizes the term *actio* as a right (*ius*) in the context of actions *in personam* in *Dig.* 44, 7, 51: *Nihil aliud est actio quam ius quod sibi debeat, iudicio persequendi*. (“An action is nothing else but the right to recover by judicial process that which is owing to one.”) For further examples, see the appendix in Donahue, “Ius,” 531ff. (which does not contain, however, the passage by Celsus just cited).

<sup>67</sup> The dating of the manuscript remains tentative; Professor Peter Borschberg holds that based on an analysis of the paper’s watermarks, the manuscript appears to have been written in the first decade of the 17th century, presumably between 1602 and 1605. Based on an analysis of the concepts used, however, I would date the work rather around the *DCQ* (1615), both because of the clear-cut subjective use of *ius* and because of a marginal note denying a natural right to punish (see below, n. 44), which would be more in line with later works such as *Defensio fidei catholicae de satisfactione Christi* and *De imperio summarum potestatum circa sacra*, both written between 1614 and 1617.

restricted by the law of God, by the law of nature [*per legem naturalem*], and by the Bible and the revelation.<sup>68</sup>

Subjective natural rights on this account are rights that one can “have,” different from the objective norms of law,<sup>69</sup> norms that may restrict the subjective rights bestowed on human beings in the state of nature.<sup>70</sup> The rights vested in the subjects of the law of nature according to the *Theses LVI* are of a universal character, insofar as they pertain to everyone *naturaliter*. Moreover, they are rights that can be described as claims *in rem* in the Roman law sense, insofar as they oblige everybody else to respect these rights. The natural, universal subjective rights in the *Theses LVI* constitute a quasi-sovereign territory of the individual subject of law in the state of nature, and are an absolute barrier to the claims of all the other subjects of natural law:

Human beings do not have a natural right [*ius non habet naturaliter*] to the life, body, actions and possessions of another man, insofar as the other’s life, body, actions or possessions are ordinary means to the self-interested [*ad bonum suum*] pursuit of the right [*ius*] to life, body, actions, and possessions [*res*] that everybody has [*quod quisque habet*]. Consequently, human beings do not have a [natural] right to punishment.<sup>71</sup>

The idea of a *numerus clausus* of rights that one can have, as put forward in *De iure praedae* as well as in *De iure belli ac pacis*, can be seen in the *Theses LVI* too. The rights here are comparable to the rights enumerated in *De iure praedae*; the right to one’s own actions points to the freedom of contract, which constitutes the premise of the right

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<sup>68</sup> *TQ*, fol. 287 recto, thesis 2: *Homo naturaliter ius habet in actiones et res suas tum retinendi tum abdicandi: vita autem et corpus retinendi tantum. Hoc tamen ius a iure Dei dimanans ab eodem restringitur, per legem naturalem et per verbum tum extrinsecum tum intrinsecum, id est Scripturam et Revelationem.*

<sup>69</sup> See Haggemacher, “Droits subjectifs,” 81f., who assumes that Grotius only later came to differentiate strictly between subjective and objective *ius*.

<sup>70</sup> In a similar way as natural liberty in the *Institutes* may be restricted by law (*ius*); Flor. *Inst.* 1, 3, 1: *Et libertas quidem est, ex qua etiam liberi vocantur, naturalis facultas eius quod cuique facere libet, nisi si quid aut vi aut iure prohibetur.* Pace Skinner, *Liberty*, 19, the Romans jurists obviously thought of freedom as a natural power.

<sup>71</sup> *TQ*, fol. 287 recto, thesis 6: *Homo autem ius non habet <naturaliter> in <vitam corpus> actiones et res alterius hominis, iniquatenus illae <vita corpus> actiones aut res alterius sunt media ordinata ad consequendum <ad bonum suum> ius quod quisque habet in vitam, corpus, actiones et res suas. <Ergo non habet ius puniendi>[.]* The bracketed words are marginal notes inserted by Grotius.

to enforce contractual claims. The right to one's own things foreshadows the right to private property, as well as to contractual claims arising out of contracts of sale, while the right to one's life and body corresponds to the right to self-defense. It is remarkable that, as opposed to both *De iure praedae* and *De iure belli ac pacis*, the right to one's own life and body is not alienable.

In concluding the general discussion of *ius* as subjective right, I submit that subjective rights claims clearly do not hinge on the language of rights and the *ius* terminology, but must be conceived as already inherent in the remedies granted under the law of the *Digest*. The intellectual history of natural rights must consequently be seen as an extension of the remedies granted by Roman procedure—Grotius casting subjective *iura* in actions and injunctions granted by the Roman lawyers of the *Digest*. Grotius' originality lies in the fact that he identified an already existing tradition of natural rights with Roman law remedies, internalizing these remedies by making them a subjective moral quality of each individual, or each individual group of people.

## 2. *The Right to Self-Defense*

Both in this and in the next section, the ethical works of Marcus Tullius Cicero (106-43 B.C.), *De finibus (On Ends)* and especially *De officiis (On Duties)* play a vital role. It is important to note that Cicero's hugely influential<sup>72</sup> ethical treatises, albeit containing and reflecting upon the doctrines of the most important Hellenistic philosophical schools, are, first and foremost, an expression of Roman practical morality, with a particular emphasis on political morality and the virtue of justice. The theory of justice advanced in *De officiis*, it is true, reflects a lot of Greek, mainly Stoic, ideas, but philological scholarship has moved increasingly away from treating Cicero as just another source for Stoic thought, acknowledging the huge part Roman law and jurisprudence are playing in Cicero's theory of justice.<sup>73</sup> Not only did Cicero frequently borrow legal cases in order to illustrate moral and political issues,<sup>74</sup> but also, more importantly, the substantive rules

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<sup>72</sup> On the influence of *De officiis*, see the brief sketch with literature in A. R. Dyck, *A Commentary on Cicero, De Officiis* (Ann Arbor, 1996), 39-49.

<sup>73</sup> See *ibid.*, 29-36.

<sup>74</sup> See, e.g., *Cic. off.* 3, 50-68; 2, 78-80.

of Roman property and contract law entered his theory of justice.<sup>75</sup> We should keep the quasi-legal, Roman character of Cicero's moral philosophy in mind as we proceed to the way Grotius elaborated his rights doctrine by making use of Roman sources.

Grotius' right to self-defense emanates from his first so-called law (*lex*), as formulated in the "Prolegomena" to *De iure praedae*: "It shall be permissible to defend [one's own] life and to shun that which threatens to prove injurious."<sup>76</sup> In the marginal note, Grotius referred to passages out of Cicero's works *De officiis* and *De finibus* as the sources of that first law, which indeed constitutes a paraphrase of the adduced Ciceronian passages wherein the natural appetite for self-preservation is being portrayed, in a Stoic tradition, as common to all living creatures.<sup>77</sup> What Cicero had described as natural and therefore desirable in a Stoic sense,<sup>78</sup> Grotius formulated as a permissive norm of the law of nature. Moreover, Grotius in the marginal note to his "first law" also referred to Cicero's forensic speech *Pro Milone*, where Cicero himself, writing in 52 B.C., a time ridden with lawlessness and bound for civil war, had rendered self-preservation as a legal principle.<sup>79</sup> Self-help was lawful in the absence of judicial authority and in a context of diminishing sovereign power, Cicero held, under a "law which is a law not written, but created by nature."<sup>80</sup>

In the seventh chapter of *De iure praedae*, Grotius, setting forth the right to self-defense, drew again on Cicero's *Pro Milone*. Every just war according to Grotius has its origin in one of four just causes of war, self-defense (*sui defensio*) being the first of these just causes. Grotius then justifies self-defense with an argument out of *Pro Milone*, according to which "the act of homicide is not only just but even necessary, when it

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<sup>75</sup> See Cic. *off.* 2, 78-80, where the injustice of re-distribution is evoked; see below.

<sup>76</sup> *IPC* 2, fol. 6: *VITAM TUERI ET DECLINARE NOCITURA LICEAT*.

<sup>77</sup> Cic. *off.* 1, 11: *Principio generi animantium omni est a natura tributum, ut se, vitam corpusque tueatur, declinet ea, quae nocitura videantur, omniaque, quae sint ad vivendum necessaria anquirat et paret, ut pastum, ut latibula, ut alia generis eiusdem.* Cic. *fin.* 4, 16: *Omnis natura vult esse conservatrix sui, ut et salva sit et in genere conservetur suo.* Cic. *fin.* 5, 24: *Omne animal se ipsum diligit, ac simul ortum est id agit ut se conservet, quod hic ei primus ad omnem vitam tuendam appetitus a natura datur, se ut conservet atque ita sit affectum ut optime secundum naturam affectum esse possit.*

<sup>78</sup> For the Stoic background (*oikeiosis*) of Cic. *off.* 1, 11, see Dyck, *Commentary*, 86ff. For Grotius' use of the Stoic concept, see B. Straumann, "Appetitus societatis and *oikeiosis*: Hugo Grotius' Ciceronian Argument for Natural Law and Just War," *Grotiana New Series* 24/25 (2003/2004): 41-66.

<sup>79</sup> Cic. *Mil.* 10.

<sup>80</sup> *Ibid.*; cited in *IPC* 1, fol. 4'.

represents the repulsion of violence by means of violence.”<sup>81</sup> The right to self-defense according to Grotius inheres naturally not only in commonwealths, but also in individuals: “The examples afforded by all living creatures show that force privately exercised for the defence and safeguarding of one’s own body is justly employed.”<sup>82</sup> Grotius supports this contention with various Roman law passages, the following passage from Florentinus out of the *Digest* among them:

[It belongs to the law of nations] to repel violent injuries. You see, it emerges from this law that whatever a person does for his bodily security he can be held to have done rightfully; and since nature has established among us a relationship of sorts, it follows that it is a grave wrong for one human being to encompass the life of another.<sup>83</sup>

Defense against an unlawful attack constitutes, according to the law of the *Digest*, a justification for an encroachment on somebody else’s rights. Grotius adduces a further passage from the *Digest* which excepts the bearing of weapons “for the purpose of protecting one’s own safety” from the general prohibition under the *lex Julia* on *vis publica* to collect or carry weapons.<sup>84</sup> Clearly, Grotius’ just cause of self-defense is modeled on the notion of self-defense as emerging from the *Digest* and some of Cicero’s works, with the background of Cicero’s speech *Pro Milone*—the civil warlike circumstances of the fading Roman republic with its crumbling institutions—providing the paradigm for Grotius’ concept of a natural state, characterized by the absence of judicial organs and the norms of a natural law.

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<sup>81</sup> *IPC* 7, fol. 29’: *Bellum igitur omne quatuor causarum ex aliqua oriri necesse est. Prima est sui defensio, ex lege prima. Nam ut Cicero inquit, illud est non modo iustum, sed etiam necessarium, cum vi vis illata defenditur.* The citation is from *Cic. Mil.* 9.

<sup>82</sup> *IPC* 7, fol. 30a: *Ad defensionem tutelamque corporis sui privata vis iusta est omnium animantium exemplo.*

<sup>83</sup> *Flor. Dig.* 1, 1, 3: *ut vim atque iniuriam propulsemus: nam iure hoc evenit, ut quod quisque ob tutelam corporis sui fecerit, iure fecisse existimetur, et cum inter nos cognationem quandam natura constituit, consequens est hominem homini insidiari nefas esse.*

<sup>84</sup> *Dig.* 48, 6, 11, 2: *Qui telum tutelam salutis suae causa gerunt, non videntur hominis occidendi causa portare.*

### 3. The Right to Private Property

The second of Grotius' so-called "laws" that he expounds in the "Prolegomena" to *De iure praedae* reads: "It shall be permissible to acquire for oneself, and to retain, those things which are useful for life."<sup>85</sup> Citing from Cicero's *De officiis*, Grotius goes on to write:

The latter precept, indeed, we shall interpret with Cicero as an admission that each individual may, without violating the precepts of nature, prefer to see acquired for himself rather than for another, that which is important for the conduct of life.<sup>86</sup>

Grotius explains that among the ancient schools of philosophy there had been unity in this regard, backing up this contention with a reference to Cicero's portrayal of the various ethical doctrines in *De finibus*.<sup>87</sup>

In *Mare liberum* (chapter twelve of *De iure praedae*), Grotius explains the origin of the institution of private property by paraphrasing Cicero's explanation of the acquisition of private property in *De officiis*, an explanation that is based on the Roman law concept of long occupancy (*vetus occupatio*).<sup>88</sup> In the "Prolegomena," Grotius writes that use of certain things requires the acquisition (*apprehensio*) and possession (*possessio*) of these things, and that hence the institution of private property (*dominium*) had originated.<sup>89</sup> In the marginal note, Grotius refers to a passage by Paulus out of book 41 of the *Digest*, where the origin of private property is traced back to "natural possession," i.e. the acquisition of possession of an unowned thing *ab initio*.<sup>90</sup> Grotius' is an account of

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<sup>85</sup> *IPC* 2, fol. 6: *ADIUNGERE SIBI QUAE AD VIVENDUM SUNT UTILIA EAQUE RETINERE LICEAT.*

<sup>86</sup> *IPC* 2, fol. 6: *quod quidem cum Tullio ita interpretabimur: concessum sibi quisque ut malit, quod ad vitae usum pertinet, quam alteri acquiri id fieri non repugnante natura.* Grotius is citing from *Cic. off.* 3, 22, where we read: *Nam sibi ut quisque malit, quod ad usum vitae pertineat, quam alteri acquirere, concessum est non repugnante natura [...].* In *De iure belli ac pacis*, Grotius cited the whole paragraph from *De officiis*.

<sup>87</sup> *IPC* 2, fol. 6: *Hac enim de re et Stoicis et Epicureis et Peripateticis convenit, ne Academici quidem videntur dubitasse.*

<sup>88</sup> *IPC* 12, fol. 101' (=ML 5, p. 25), adducing *Cic. off.* 1, 21.

<sup>89</sup> *IPC* 2, fol. 6f.

<sup>90</sup> *Dig.* 41, 2, 1, 1: *Dominiumque rerum ex naturali possessione coepisse Nerva filius ait eiusque rei vestigium remanere in his, quae terra mari caeloque capiuntur: nam haec protinus eorum fiunt, qui primi possessionem eorum adprehenderint.*

private property that does not take private property to be an original institution of natural law, but, once constituted, private property is protected by the natural legal rules—there are, on Grotius’ view, principles of natural justice governing property holdings. Property, then, is not constituted by government.<sup>91</sup> This is very similar to Cicero’s account in *De officiis*,<sup>92</sup> although it seems that both Cicero and the account in book 41 of the *Digest* in fact presuppose the notion of private property as an institution rather than explaining its origin, and explain merely the *acquisition* of private property.

Grotius holds that the institution of private property is not the result of a sudden decision, but was brought about by slow change that started under the guidance of nature (*monstrans natura*).<sup>93</sup> There are certain things, Grotius writes, which are consumed by use, a fact making it impossible to distinguish between use and property.<sup>94</sup> Grotius predicates this view on a passage of the *Digest*, where usufruct (*ususfructus*) of money and other consumables is being dealt with.<sup>95</sup> With regard to these things, the usufructuary under Roman property law becomes the full owner. The thing belongs to him in an exclusive way, belonging to nobody else at the same time—the concept of private property as the most comprehensive right somebody can have in a thing is therewith formulated. This concept was then, according to Grotius, extended to clothes and gradually to immovable things.<sup>96</sup> As the institution of private property had thus been “invented” (*reperta proprietas*), the law codifying that institution was stipulated in order

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<sup>91</sup> A view very similar to John Locke’s in his *Second Treatise of Government*; see J. Locke, *Two Treatises of Government*, ed. P. Laslett (Cambridge, 1967), *Second Treatise*, sects. 3, 124, 134, 136. See also J. Waldron, “Locke, Tully, and the Regulation of Property,” *Political Studies* 32 (1984), 98.

<sup>92</sup> See Cic. *off.* 1, 21. For the status of private property in Cicero’s political thought, see N. Wood, *Cicero’s Social and Political Thought* (Berkeley, 1988), 111-115.

<sup>93</sup> For the conception of private property in *Mare liberum*, see the survey in J. Tully, *A Discourse*, 68-70.

<sup>94</sup> *IPC* 12, fol. 101 (=ML 5, p. 24): *Ad eam vero quae nunc est dominiorum distinctionem non impetu quodam sed paulatim ventum videtur initium eius monstrante natura. Cum enim res sint nonnullae quarum usus in abusu consistit, aut quia conversae in substantiam utentis nullum postea usum admittunt, aut quia utendo fiunt ad usum deteriores, in rebus prioris generis, ut cibo et potu, proprietates statim quaedam ab usu non seiuncta emicuit.*

<sup>95</sup> *Dig.* 7, 5: *De usu fructu earum rerum, quae usu consumuntur vel minuuntur.* This corresponds to the argument used by Pope John XXII against the Franciscans in the 14th century; Grotius in the marginal note refers both to John XXII and to Thomas Aquinas. See Tierney, *Idea*, 330f., who ascribes Grotius’ reasoning solely to the canonistic tradition, ignoring that John XXII himself had argued using Roman law principles.

<sup>96</sup> *IPC* 12, fol. 101 (=ML 5, p. 24): *Hoc enim est proprium esse, ita esse cuiusquam ut et alterius esse non possit: quod deinde ad res posterioris generis, vestes puta et res mobiles alias aut se moventes ratione quadam productum est. Quod cum esset, ne res quidem immobiles omnes, agri puta indivisae manere potuerunt [...].*

to “imitate nature.”<sup>97</sup> Private property, then, is on Grotius’ account an institution of the state of nature, perfectly possible apart from civil society and government. Although not existing by nature, the institution nevertheless came into being in a natural way. Grotius adduces the famous theater analogy, which originally stems arguably from Chrysippus,<sup>98</sup> citing it from Seneca’s *De beneficiis*: “The equestrian rows of seats belong to *all* [omnes] the Roman knights; yet the place that I have *occupied* [occupavi] in those rows becomes my *own* [proprius].”<sup>99</sup>

In the *Defensio capitis quinti*, his defense of chapter five of *Mare liberum* against William Welwod, Grotius describes the emergence of private property in a concise passage dedicated to the interpretation of Cicero’s statement in *De officiis* that “no property is private by nature.”<sup>100</sup> Welwod had wrongly ridiculed this statement by Cicero, Grotius argues: Cicero should not be read as saying that nature contradicts private property, he had rather been of the opinion that nature in itself did not make anything private property:<sup>101</sup>

Therefore, in order that this thing become the property of that man, some deed [factum] of the man should intervene [intercedere], and therefore nature itself does not do this by itself. Hence it is evident that community [communitas] is prior to property [proprietas]. For property does not occur except through occupation [occupatio], and before occupation, there must precede the right of occupation [ius occupandi]. Now this right [ius] is not competent to this man or that man, but to all

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<sup>97</sup> *IPC* 12, fol. 101’ (=ML 5, p. 25): *Repertae proprietati lex posita est quae naturam imitaretur.*

<sup>98</sup> See Cic. *fin.* 3, 67, where the following statement is imputed to Chrysippus: *Sed quemadmodum, theatrum cum commune sit, recte tamen dici potest eius esse eum locum quem quisque occupavit, sic in urbe mundove communi non adversatur ius quo minus suum quidque cuiusque sit.* See A. A. Long, “Stoic Philosophers on Persons, Property-Ownership and Community,” in R. Sorabji (ed.), *Aristotle and After* (London, 1997), 24f., who takes Cicero at his word, ascribing this moral justification of private property not very plausibly already to the Greek Stoa from Chrysippus. See thereto the criticism in P. Mitsis, “The Stoic Origin,” 171f.

<sup>99</sup> *IPC* 12, fol. 101’ (=ML 5, p. 25): *Equestria OMNIUM equitum Romanorum sunt: in illis tamen locus meus fit PROPRIUS, quem OCCUPAVI.* The citation is from Sen. *ben.* 7, 12, 3.

<sup>100</sup> Cic. *off.* 1, 21: *privata nulla natura.* Translations of *De officiis* are taken from Cicero, *On Duties*, ed. M. T. Griffin, E. M. Atkins (Cambridge, 1991); some of the translations have been modified.

<sup>101</sup> *DCQ*, 336: *Inter quae Ciceronis illud irrideri maxime miror, nihil esse privatum natura, cum sit apertissimae veritatis. Non enim hoc vult Cicero, repugnare naturam proprietati et quasi vetare ne quid omnino proprium fiat, sed naturam per se non efficere ut quicquam sit proprium [...].* Grotius’ interpretation of Cicero is in line with the standard one; see M. Wacht, “Privateigentum bei Cicero und Ambrosius,” *Jahrbuch für Antike und Christentum* 25 (1982): 35-38.

men equally, and is rightly expressed under the term ‘natural community’ [*communitas naturalis*]. And hence it happens that what has not yet been occupied by any people or by a man is still common, that is, belongs to no one, and open equally to all. By this argument it is surely proved that nothing belongs [*proprium*] to anyone by nature.<sup>102</sup>

Everyone therefore has at least potentially a right to acquisition in the sense of occupation and in this sense a right to private property. Unlike in the *Theses LVI*, private property here in the *Defensio* (as already in *De iure praedae*) is not simply presupposed as natural, but its emergence as an institution is explained, and at the same time the emergence of the existing, concrete property regime is explained as well. The explanation is clearly taken from Roman law, especially book 41 of the *Digest*,<sup>103</sup> and from Cicero,<sup>104</sup> who himself had obviously absorbed the Roman law tenets regarding the natural acquisition of property. The main idea consists in every human being having *ab initio* just a general right to be *eligible* to acquire property by occupation, i.e. a right to the *possibility* of being a property-owner,<sup>105</sup> and not a general right to private property as such. It would be correct to describe Grotius’ right to actual property as a special right,<sup>106</sup> having come into being by virtue of certain contingent transactions, and giving the right-bearer an exclusive, absolute right *in rem* against everyone else, while only his right to be *eligible* to acquire property could be adequately described as a general right *in rem* inhering in every human being *ab initio*.<sup>107</sup>

The process of acquisition itself, or rather the normative principles that apply to that process, are not Grotius’ main concern. The *distribution* of property is left largely to

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<sup>102</sup> *DCQ*, 336: *ergo ut res ista fiat istius hominis, factum aliquod hominis debet intercedere, non ergo hoc facit ipsa per se natura. Unde etiam illud apparet, communitatem priorem esse proprietate. Nam proprietates non contingit nisi occupatione, ante occupationem vero praecedat necesse est ius occupandi; hoc autem ius non huic aut illi, sed universis omnino hominibus ex aequo competit, ideoque communitatis naturalis nomine recte exprimitur. Et hinc evenit, ut quae nondum occupata sunt aut a populo ullo aut ab homine etiam nunc sint communia, hoc est nullius propria omnibus ex aequo exposita: quo argumento certissime evincitur nihil a natura cuiquam esse proprium.*

<sup>103</sup> See *Dig.* 41, 1, 1-41, 9, 2; the passages are taken mainly from Gaius.

<sup>104</sup> *Cic. off.* 1, 21.

<sup>105</sup> See J. Waldron, *The Right to Private Property* (Oxford, 1988), 382f.

<sup>106</sup> For a discussion of such special rights *in rem*, see Waldron, *Private Property*, 106-109.

<sup>107</sup> In the *TQ*, all the rights described are protected absolutely in that the holders of the rights hold an absolute claim-right against everyone else, entailing a correlative duty of non-interference on the part of everyone else; the subjective rights in *TQ* are all general rights *in rem*, inhering in everyone *ab initio*.

coincidence. The origin of concrete claims to property, characterized by no moral restrictions, stands vis-à-vis the completed institution of private property, which serves in Cicero as well as in Grotius as the main yardstick for a natural justice of *compensatory* character. Apart from the Roman law requirement that the thing to be acquired as property be *res nullius*, i.e. not yet in anybody else's property,<sup>108</sup> the original acquisition and distribution of property are not subject to any further normative criteria,<sup>109</sup> neither on Cicero's nor indeed on Grotius' account. Once emerged, however, private property serves as the pivotal criterion of natural justice. In speaking of the existing property claims of his time, Cicero says, immediately after the passage cited by Grotius: "If anyone else should seek any of it [i.e. already existing, distributed property] for himself, he will be violating the law of human fellowship."<sup>110</sup> This is a passage Grotius refers to in the marginal note to his fourth so-called law, which indeed should be read as a paraphrase of Cicero: "Let no one seize possession of that which has been taken into the possession of another."<sup>111</sup> It is probable—although he does not say explicitly in *De iure praedae*<sup>112</sup>—that Grotius also has an example by Chrysippus in mind, handed down by Cicero in *De officiis*, which may serve as a normative principle for the process of acquisition by first occupancy:

Among Chrysippus' many neat remarks was the following: "When a man runs in the stadium he ought to struggle and strive with all his might to be victorious, but he ought not to trip his fellow-competitor or to push him over."<sup>113</sup>

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<sup>108</sup> For the influence of the Roman doctrine of *res nullius* on the international law doctrine of *terra nullius*, see R. Lesaffer, "Argument from Roman Law in Current International Law: Occupation and Acquisitive Prescription," *The European Journal of International Law* 16 (2005): 25-58, at 45f. Lesaffer claims wrongly, however, that Roman law had not recognized the occupation (*occupatio*) of land as a mode of acquisition; this might be true with regard to provincial land, but real property in Italy could be acquired by occupation, usually in combination with adverse possession (*usucapio*).

<sup>109</sup> Although the criteria are meager, it is not justified to speak of "no criterion for deciding whether an entitlement is just", as Julia Annas does; J. Annas, "Cicero on Stoic Moral Philosophy and Private Property," in M. Griffin, J. Barnes (eds.), *Philosophia Togata* (Oxford, 1989), 170. In *Cic. off.* 1, 21, victory in a war is mentioned as a further possibility of acquiring property, without clarifying whether it is required that the war be just, which would obviously constitute a further normative criterion. See the discussion of this passage in Dyck, *Commentary*, 110f. Annas, "Cicero," 170, n. 25 describes conquest as unjust acquisition, without considering conquest in a just war.

<sup>110</sup> *Cic. off.* 1, 21: *e quo si quis sibi appetet, violabit ius humanae societatis.*

<sup>111</sup> *IPC* 2, fol. 7: *NE QUIS OCCUPET ALTERI OCCUPATA. Haec lex abstinentiae [...].*

<sup>112</sup> In *De iure belli ac pacis* Grotius referred to it; see *IBP* 2, 2, 2, 5, note 6.

<sup>113</sup> *Cic. off.* 3, 42: *Scite Chrysippus, ut multa, 'qui stadium', inquit, 'currit, eniti et contendere debet quam maxime possit, ut vincat, supplantare eum, quicum certet, aut manu depellere nullo modo debet; sic in vita sibi quemque petere, quod pertineat ad usum, non iniquum est, alteri deripere ius non est.'*

According to one critic, this concept has introduced an “economic individualism” into political thought, which had been “alien to the speculations of Plato and Aristotle.” The Ciceronian view of the just original acquisition of property is thus convincingly being seen in a tradition that leads up to John Locke and, later, Robert Nozick.<sup>114</sup> A very strong protection of property rights as well as correspondingly strong skepticism towards (re-) distributive justice is of course a corollary of this doctrine, as Cicero himself knew:

Those who wish to present themselves as *populares*, and for that reason attempt agrarian legislation so that landholders are driven from their dwellings, or who think that debtors ought to be excused from the money that they owe, are undermining the very foundations of the political community: [...] justice [*aequitas*] utterly vanishes if everyone may not keep that which is his. For [...] it is the proper function of a polity [*civitas*] and a city [*urbs*] to ensure for everyone a free [*libera*] and unworried guardianship [*custodia*]<sup>115</sup> of his property.<sup>116</sup>

Indeed, in an earlier passage Cicero had maintained that men had sought protection in cities “in the hope of safeguarding their property” and that political communities and polities were “constituted especially so that men could hold on to what was theirs,”<sup>117</sup> which led him to express particular concern about property taxes (*tributum*).<sup>118</sup>

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<sup>114</sup> N. Wood, *Cicero's Thought*, 114: “Cicero, like John Locke much later, sees no contradiction between the imperative of morality and the demand of self-advancement as long as the latter is accomplished in a reasonable fashion and not at the expense of others, although both have a rather broad interpretation of what this means.” Similar A. A. Long, “Cicero's Politics in *De officiis*,” in A. Laks, M. Schofield (eds.), *Justice and Generosity* (Cambridge, 1995), 213-240, at 233. See also Waldron, *Private Property*, 153-155, who describes this account of the state of nature as “negative communism.”

<sup>115</sup> The term *custodia* is a legal term meaning, interestingly, an obligation to prevent theft. It appears in the *Digest* often as an absolute obligation, imposing strict liability without reference to negligence; see, e.g., *Dig.* 4, 9, 1, 8.

<sup>116</sup> *Cic. off.* 2, 78: *Qui vero se populares volunt ob eamque causam aut agrariam rem temptant, ut possessores pellantur suis sedibus, aut pecunias creditas debitoribus condonandas putant, labefactant fundamenta rei publicae, [...] aequitatem, quae tollitur omnis, si habere suum cuique non licet. Id enim est proprium [...] civitatis atque urbis, ut sit libera et non sollicita suae rei cuiusque custodia.*

<sup>117</sup> *Cic. off.* 2, 73: *Hanc enim ob causam maxime, ut sua tenerentur, res publicae civitatesque constitutae sunt. Nam, etsi duce natura congregabantur homines, tamen spe custodiae rerum suarum urbium praesidia quaerebant.*

<sup>118</sup> *Cic. off.* 2, 74.

Grotius clearly is an important element of that property-centered tradition of a “historical,” “entitlement theory of justice.”<sup>119</sup> Natural justice with regard to the original distribution of property is both in Cicero and in Grotius not predicated on the justness of the *result* of the distribution, but exclusively on the *procedure* governing the distribution. Only this procedure must be compatible with natural law in order for the original distribution of property to qualify as legitimate.<sup>120</sup> Grotius does not endeavor to argue morally for his preference of procedural over result-oriented natural justice, which is the obvious conceptual consequence of Grotius’ developing a theory of the origin of the *institution* of private property out of the Roman law theory of natural *acquisition* of private property, without even trying to challenge the latter morally. Given the function of *De iure praedae* as a legal apology of the military expansion of the Dutch East India Company in Southeast Asia, this is not surprising—the Roman law doctrine allowed Grotius to refer the rules concerning private property solely to land, without having to abandon the idea of natural acquisition, and to exclude the sea from the things that are subject to the right to acquire by occupation (*ius occupandi*), making therewith the Portuguese claims to the seaway to the East Indies appear as unlawful encroachments on property common to everyone (*res communis*).<sup>121</sup>

#### 4. Contractual Rights

Trade presupposes both some conception of private property and the idea of a right to alienate property. In reference to the 18<sup>th</sup> book of the Digest, which deals with the contract of sale, Grotius explains the origin of trade as the necessary consequence of the abolishment of common property and regards commerce as the natural and universal foundation of contracts.<sup>122</sup> Citing from Aristotle’s *Politics*, Grotius writes that freedom of trade is part of natural law and for this reason cannot be abrogated, unless with the

<sup>119</sup> As Robert Nozick would have it; see Nozick, *Anarchy, State, and Utopia* (New York, 1974), 153-160.

<sup>120</sup> For criticism of these arguments of procedural justice, see Waldron, *Private Property*, 253-283.

<sup>121</sup> See R. Brandt, *Eigentumstheorien*, 37 not paying attention to the historical context of Grotius’ doctrine; see also F. Wieacker, *Privatrechtsgeschichte der Neuzeit*, 2<sup>nd</sup> ed. (Göttingen, 1967), 292.

<sup>122</sup> *IPC* 12, fol. 114 (=ML 8, p. 62): *Sed cum statim res mobiles monstrante necessitate quae modo explicata est in ius proprium transissent, inventa est permutatio, qua quod alteri deest ex eo quod alteri superest suppleretur. [...] Postquam vero res etiam immobiles in dominos distingui coeperunt, sublata undique communio [...] necessarium fecit commercium [...]. Ipsa igitur ratio omnium contractuum universalis, h( metablhtikh/ a natura est [...].* Grotius refers to *Dig.* 18, 1, 1 pr.: *Origo emendi vendendique a permutationibus coepit.*

“consent of all nations,”<sup>123</sup> a sentence Grotius himself would later be reproached with during the Anglo-Dutch colonial conference in 1613 in London.<sup>124</sup>

Contractual relations are in Grotius’ view derived from freedom of action, forming the origin of any positive arbitrary law that deviates from the law of nature. In the *Theses LVI*, Grotius renders the freedom of action as “the right to one’s own actions” (*ius in actiones suas*), a right alienable by an indication of will (*indicium voluntatis*):

Both natural law [*lex naturalis*] and the Bible relate the restriction that man, by an indication of his will [*indicio voluntatis*], is being obliged [*obligetur*] to his fellow man and insofar gives up his right [*ius*], both with regard to his actions [*actiones*] and his possessions [*res*].<sup>125</sup>

This means that the *Theses LVI* do not merely state a freedom of action, but they posit a natural right to one’s action, implying the recognition of a *power*<sup>126</sup> to do something which is given legal effect under the law of nature. In *De iure praedae*, this power or right to one’s actions is being described as analogous to the Roman conception of private property; liberty is to actions what private property is to things—natural liberty consists in the faculty to do what everyone wants to do, Grotius holds in reference to a passage in the *Institutes*.<sup>127</sup> Unlike private property, which in *De iure praedae* is not originally

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<sup>123</sup> *IPC* 12, fol. 114’ (=ML 8, p. 63f.): *Commercandi igitur libertas ex iure est primario gentium, quod naturalem et perpetuam causam habet, ideoque tolli non potest, et si posset non tamen posset nisi omnium gentium consensu [...]*. Previously, Grotius cites Aristot. *pol.* 1, 1257a15-17.

<sup>124</sup> For the arguments of the English delegation, referring to ML 8, p. 63f., see W. J. M. Eysinga, *The Colonial Conferences between England and the Netherlands in 1613 and 1615*, vol. 1, Bibliotheca Visseriana 15 (Leiden, 1940), Ann. 38, p. 115f.: *Nec enim latere vos arbitramur quid in hanc sententiam scripserit assertor Maris liberi: ‘Commercandi (inquit) libertas, quae ex iure est primario gentium et quae naturalem et perpetuam causam habet, tolli non potest et, si posset, non tamen nisi omnium gentium consensu’*. See also *ibid.*, Ann. 39, p. 120; for the colonial conference in general see G. N. Clark, *The Colonial Conferences between England and the Netherlands in 1613 and 1615*, vol. 2, Bibliotheca Visseriana 17 (Leiden, 1951), 59-81.

<sup>125</sup> *TQ*, fol. 287 recto, thesis 3: *Lex naturalis simul et Scriptura hanc restrictionem tradunt, ut Homo indicio voluntatis <alteri> facto obligetur, et eatenus amittat ius cum in actiones tum in res suas*.

<sup>126</sup> Best described in Hohfeldian terms as a power to alter existing legal arrangements; see Hohfeld, *Legal Conceptions*; for a useful summary, see J. Feinberg, *Social Philosophy* (Englewood Cliffs, 1973), chapter 4; see for a discussion of such a power in the context of free trade Waldron, *Private Property*, 296.

<sup>127</sup> *IPC* 2, fol. 10: *Quid enim est aliud naturalis illa libertas, quam id quod cuique libitum est faciendi facultas? Et quod libertas in actionibus idem est dominium in rebus*. Grotius refers to Flor. *Inst.* 1, 3, 1: *Et libertas quidem est [...] naturalis facultas eius quod cuique facere libet [...]*. The passage had already been used by Fernando Vázquez de Menchaca for the identification of *dominium* with *naturalis libertas* in his *Controversiae illustres* (1, 17, 4-5). See Tuck, *Natural Rights*, 51; Haggemacher, “Droits subjectifs,” 92.

natural, the power or right to one's action is—as in the *Theses LVI*—a natural institution in the strict sense. Both actions and private property, however, can be alienated according to *De iure praedae*, which extends the commerce friendly aspect of the right to private property to one's own actions, and, in *De iure belli ac pacis* at the latest, to one's own person and body.<sup>128</sup>

Breaches of contract constitute, like violations of property rights, just causes of war. Grotius derives this formally from his sixth so-called law that “Good deeds must be recompensed.”<sup>129</sup> Substantively, however, Grotius derives this just cause of war from the necessary condition for just war under the Roman fetial law (*ius fetiale*) that redress be demanded (*rerum repetitio*). Grotius attaches importance to the statement that breach of contract gives rise to an independent just cause of war, substantiating his claim by reference to the fetial formula handed down by Livy:

A third cause [of just war]—one that a great many authorities neglect to mention—turns upon debts arising from a contract or from some similar source. To be sure, I presume that this third group of causes has been passed over in silence by some persons for the reason that what is owed us is also said to be our property. Nevertheless, it has seemed more satisfactory to mention this group specifically, as the only means of interpreting that well-known formula of fetial law: “And these things, which ought to have been given, done or paid, they have not given, paid or done.”<sup>130</sup>

The addition of breach of contract to the traditional causes of war constitutes a clear deviation from the medieval tradition of just war jurisprudence, which had not acknowledged the violation of a contractual obligation as a just cause of war. Grotius' novel system of the law of war is best seen in light of the private law terminology of the law of the *Digest*, and of the parallel between individuals and polities, private and public

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<sup>128</sup> In the *Theses LVI*, alienation is restricted to *res* and *actiones*, while later Grotius extends freedom of contract congruously to body and life.

<sup>129</sup> *IPC* 2, fol. 8: *BENEFACATA REPENSANDA*.

<sup>130</sup> *IPC* 7, fol. 29': *Tertia, quae a plerisque ommissa est, ob debitum ex contractu, aut simili ratione. Sed idcirco praeteritum hoc puto a nonnullis quia et quod nobis debetur nostrum dicitur. Sed tamen exprimi satius fuit cum et Iuris illa Fecialis formula non alio spectet: Quas res nec dederunt, nec solverunt, nec fecerunt, quas dari, fieri, solvi oportuit.* The rendering of the fetial formula is taken from Liv. 1, 32, 5.

war that goes along with that terminology.<sup>131</sup> The use of force for the collection of debt is in Grotius' view just under the law of nature,<sup>132</sup> a stance characteristically substantiated by reference to the law of the *Digest*.<sup>133</sup> Grotius makes it clear that the right to wage war corresponds to a claim against a person under a contract in Roman law, or rather to the relevant remedy, the *actio in personam*. If according to Roman law there lies an *actio in personam* for the enforcement of a contractual claim, then in the state of nature everyone can under the law of nature legitimately enforce his contractual claims by the use of force, Grotius holds—the institution of contract is for Grotius an institution of natural law, emanating from the natural liberty of action human beings in the natural state enjoy.<sup>134</sup>

These causes of war, corresponding to the *actiones in personam* under a contract in Roman law, are the same causes that Grotius in the “Prolegomena” had identified with the voluntary (*hekousia*) legal transactions described by Aristotle in the *Nicomachean Ethics* under the heading of compensatory justice.<sup>135</sup> The conception of contract, however, is understood in a wide sense and extended beyond the *numerus clausus* of Roman law types of contract, to include, as in *De iure belli ac pacis*, promises (*pacta nuda*); for support of his conception, Grotius hints at those passages in the *Digest* and in

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<sup>131</sup> See Haggemacher, *Grotius et la doctrine*, 178-180, who intimates with regard to the distinction between absolute rights *in rem* and personal rights at the influence exerted by Donellus and his *Commentarii de iure civili* (1589). See also Haggemacher, “Droits subjectifs,” 113; Coing, “Zur Geschichte,” 251-254. Grotius in 1618 had in his library a copy of Donellus' commentary on the title *De pactis et transactionibus* of the *Codex Justinianus*; see P. C. Molhuysen, “De bibliotheek van Hugo de Groot in 1618,” *Mededeelingen der Nederlandsche Akademie van Wetenschappen*, Afdeling Letterkunde, Nieuwe Reeks 6, 3 (1943), Nr. 246.

<sup>132</sup> *IPC* 7, fol. 30a: [...] *privata vis iusta est omnium animantium exemplo [...] ad consequendum id quod nobis debetur.*

<sup>133</sup> *Dig.* 42, 8, 10, 16: *Si debitorem meum et complurium creditorum consecutus essem fugientem secum ferentem pecuniam et abstulissem ei id quod mihi debebatur, placet Iuliani sententia dicentis multum interesse, antequam in possessionem bonorum eius creditores mittantur, hoc factum sit an postea: si ante, cessare in factum actionem, si postea, huic locum fore.* Grotius does not cater to the differentiation made here in terms of the moment of the bankruptcy proceedings, which in absence of a judge is not relevant.

<sup>134</sup> See Haggemacher, “Droits subjectifs,” 92; see also M. Diesselhorst, *Die Lehre des Hugo Grotius vom Versprechen* (Köln, 1959), who however refers almost exclusively to *De iure belli ac pacis*.

<sup>135</sup> *IPC* 2, fol. 8, referring to *Aristot. eth. Nic.* 5, 1131a1ff. See the discussion of Grotius' use of Aristotle's theory in K. Haakonssen, “Hugo Grotius and the History,” 239-265, at 254ff. Haakonssen errs, however, in thinking that Grotius' compensatory justice is to be identified with Aristotle's particular justice, which would include distributive justice; Grotius in fact identifies his compensatory justice only with Aristotle's justice *en tois sunallagmasi*. See also *IBP* 1, 1, 8, 1.

Cicero's *De officiis* which emphasize the element of mutual consent and give less weight to form.<sup>136</sup>

This conception corresponds to the account in the *Theses LVI*; Grotius compares the relations among the inhabitants of the natural state with the relations between a physician and a patient, where the physician only has consultative power (*consilii potestas*), not entitling him to hold any claims against the patient.<sup>137</sup> It is only through the means of consent, i.e. contract, that rights can be forfeited. Thus no one has any natural right of coercion (*ius exsecutionis*). Such a right can be created only through voluntary transactions that may give rise to rights in another subject.<sup>138</sup> These transactions are clearly modeled upon the Roman consensual contracts (*obligationes consensu contractae*) as described by Gaius,<sup>139</sup> where an agreement, entirely free of form, is enough to produce enforceable contracts.

### Conclusion

Why does it matter that Grotius' doctrine of natural rights was influenced by and dependent upon certain Roman law remedies and the attending political theory? I suggest that there are three ways in which it matters: First, and maybe most importantly, the account given of the various rights Grotius is prepared to vest in the subjects of the natural law and the Roman background of these rights, if correct, adds historical data to our present-day interpretation of such rights. The historical account given can therefore

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<sup>136</sup> Grotius cites—as later in *IBP*—Cic. *off.* 1, 23 on *fides* and *Dig.* 2, 14, 1 on *pacta*. This is evidence against the view, held by Nörr, that Grotius' *fides* is a notion pertaining specifically to the law of nations, and is not derived from the *bona fides* of Roman private law; see D. Nörr, *Die Fides im römischen Völkerrecht* (Heidelberg, 1991), 45f. For *fides* in Grotius' *Parallelon rerumpublicarum*, see W. Fikentscher, *De fide et perfidia. Der Treuegedanke in den „Staatsparallelen“ des Hugo Grotius aus heutiger Sicht* (München, 1979). For the development of the doctrine of *pactum nudum* in 17th century Roman-Dutch law, see R. Zimmermann, “Roman-Dutch Jurisprudence and Its Contribution to European Private Law,” *Tulane Law Review* 66 (1991-92), 1685-1721.

<sup>137</sup> *TQ*, fol. 287 recto, thesis 7: *Quatenus autem eadem illa sunt media ordinata ad bonum cuique suum, eatenus homo alter in ea ius non habet; atque ita sapiens et medicus consilii habent potestatem non imperii: quod iure exsecutionis demonstratur*. The example can be attributed to Plato's *Gorgias*, where Gorgias illustrates the alleged necessity of rhetoric with the example of the physician who has to coax the patient into taking his medicine; see Plat. *Gorg.* 456b.

<sup>138</sup> *TQ*, fol. 287 recto, thesis 8: *Quod ita ver(um) est nisi consensus accesserit: cuius virtute alter ius habet ad eliciendi media ad bonum alterius*.

<sup>139</sup> Gai. *Inst.* 3, 135f.

contribute to a better doctrinal understanding of Grotius' natural rights, and, to the extent that Grotius proved influential, to a better understanding of modern doctrines of constitutional and human rights; if we want to inquire into the natural lawyers' conceptions of various natural rights from Grotius onwards, I suggest that we will have to look to the Roman jurists' *travaux préparatoires*, as it were, in order to gain a precise sense of those conceptions. In this sense, such a doctrinal elucidation might even contribute to the debate over the correct interpretation of liberalism as a whole, in that it can provide us with additional arguments for the doctrine—arguments taken from the Roman background that are maybe not explicitly mentioned in the early modern texts—which may enhance the doctrine's soundness.

Second, if the claims made in this paper are historically accurate, and Grotius did in fact use Roman law and Cicero because—quite apart from the pragmatic reasons that caused Grotius to use those sources—these texts provided him both with a concept of subjective rights and with detailed rules for a natural, non-political sphere, then we have reason to believe that the Romans, in their political and legal thought, developed a concept of subjective rights and the natural exercise and acquisition thereof which is much more akin to liberal conceptions of rights than Roman institutional history alone would make us believe.<sup>140</sup> The view about Grotius' close use of certain Roman sources defended in this paper implies obviously a view about those Roman sources, casting doubt on Benjamin Constant's sweeping claims about the nature of ancient and modern liberty.<sup>141</sup>

Third, an account like the one given in this paper, by showing us which tradition we are in fact part of, might help us identify some of the contingent features of that tradition—a vital prerequisite for any subsequent normative assessment of the tradition. This is of course not to say that an historical account in itself could ever vindicate or discredit any

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<sup>140</sup> Although, as intimated above (n. 24), the Roman republic's institutional history also contains evidence for the concept of negative, rights-based liberty. Grotius, in his later work *De iure belli ac pacis libri tres* (1625), where he deals more extensively with questions of political theory in the narrow sense (as opposed to natural law), mentions the Roman right of appeal (*provocatio*) several times; *IBP* 1, 3, 8, 12; 1, 3, 20, 5; 1, 4, 17. For the influence of the constitution of the Roman republic on later political thought, see A. Lintott, *The Constitution of the Roman Republic* (Oxford, 1999), 233ff.; see also F. Millar, *The Roman Republic in Political Thought* (Hanover, 2002), a work too much focused on the republic's influence on democratic thought, however.

<sup>141</sup> Interestingly, Constant was prepared to concede some amount of individual liberty to democratic Athens rather than to the Roman republic.

normative claim; it is just to say that such an account may serve to raise our sensitivity to the possibility that some of the normative claims we hitherto intuitively thought to have epistemic reasons to believe are merely the contingent product of some particular historical circumstance—which obviously does not exclude the possibility that, upon renewed normative scrutiny, taking into account the historical data, we still deem those claims valid.

As an example for the third way in which the account may matter, consider the upsetting impact it potentially has on traditionalist ethics. To wit, Constant's historical claim has appealed not only to rights friendly liberals such as Isaiah Berlin, but also to nostalgic adherents of a "back to Aristotle" ethics such as Michel Villey or Alasdair MacIntyre.<sup>142</sup> Probably most explicitly in MacIntyre's Thomist case for communitarianism, that historical claim has been made to carry some philosophical weight. According to MacIntyre, modern, that is to say post-enlightenment, rights-based ethics is internally incoherent because it is composed of poorly understood residua of the Aristotelian tradition, a diagnosis which in MacIntyre's view makes a return to Aristotelian ethics inevitable.<sup>143</sup> The inevitability of such a return to Aristotle results from MacIntyre's traditionalist relativism, a position that acknowledges a concept of the good only in relation to a given tradition and therefore relies on an historical account of that tradition, hence making itself vulnerable to historical criticism. MacIntyre does not claim that we should go back to an Aristotelian ethics because it is better *tout court* (this argument is not open to him), but because it provides a coherent foundation of the tradition, however poorly understood, we happen to be part of. An historical account like the one offered in this paper that denies our rights-based ethics this genealogy must therefore undermine MacIntyre's argument by his own lights.<sup>144</sup>

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<sup>142</sup> See Villey, "Les origines," 221-250; id., "Déformations de la philosophie du droit d'Aristote entre Vitoria et Grotius," in *Platon et Aristote à la Renaissance*, XVIe Colloque International de Tours (Paris, 1976), 201-215; A. MacIntyre, *After Virtue*, 2<sup>nd</sup> ed. (Notre Dame, 1984), *passim*.

<sup>143</sup> See MacIntyre, *After Virtue*, 51ff.; see the excellent criticism in E. Tugendhat, *Vorlesungen über Ethik*, 3<sup>rd</sup> ed. (Frankfurt a. M., 1995), 208-225.

<sup>144</sup> I do not mean to suggest, however, that we have to accept his traditionalist assumptions, far from it—we could still make a normative argument in favor of a return to Aristotle.

There are thus considerable ramifications of Grotius' use of and dependency on a Roman tradition in developing his doctrine, since it seems to suggest that some of the crucial features of modern liberalism such as deontological individual rights were in fact derived explicitly, and with good reason, from a Roman tradition. The lessons to be drawn from such an account of Grotius' doctrine of rights, then, are both of a conceptual and an historical nature. Conceptual in that this account of Grotius' doctrine of rights suggests that anything deserving the label "negative liberty" seems difficult to conceive of without a notion of subjective rights, and historical in that it may direct the ongoing search for the origins of modern rights-based moral, political, and legal thought towards the normative texts of Roman law and Roman ethics.